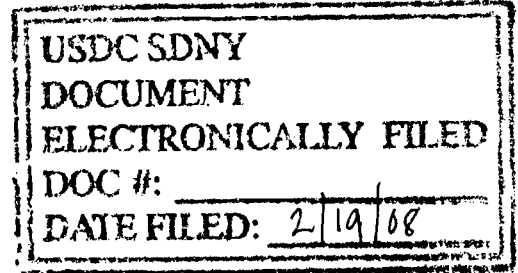


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
DH CAPITAL, LLC,

Plaintiff,

- against -

XANADOO, LLC,

Defendant.  
-----X

**ORDER**

07 Civ. 5579 (RMB)(FM)

**FRANK MAAS**, United States Magistrate Judge.

Pursuant to the telephone conference held last week, it is hereby

ORDERED that:

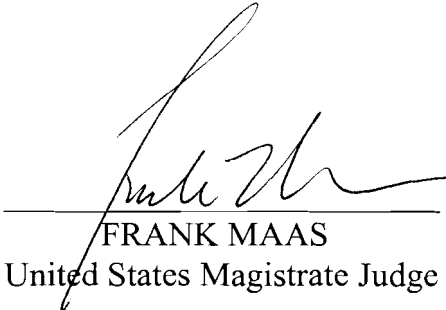
1. DH Capital's claim of work product protection for emails 4 through 7 annexed to Mr. Gotko's letter, dated February 4, 2008, is sustained. Xanadoo therefore is directed to return or destroy any copies thereof that previously were inadvertently produced.

Contrary to Xanadoo's suggestion, this case is a far cry from Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc., 215 F.R.D. 466 (S.D.N.Y. 2003). There, as here, the parties apparently disagreed as to the amounts that the defendant owed. Judge Gorenstein held that "the mere fact that a potential dispute looms on the horizon is insufficient to show that the communications regarding the . . . amount . . . would not have been made in precisely the same form as part of the regular course of [the defendant's] business irrespective of the possibility of litigation." Gulf Islands, 215 F.R.D. at 476. In this case, however, the topic under discussion in the subject emails was whether counsel should be retained because Xanadoo was waffling about its willingness to make the payment sought by DH Capital. Thus, this was not a routine discussion of the proper payoff amount, but, rather, a discussion that would not have occurred had litigation not been reasonably contemplated.

2. If the parties wish to have a settlement conference, they should send me a joint letter to that effect by February 29, 2008.

SO ORDERED.

Dated: New York, New York  
February 19, 2008



FRANK MAAS  
United States Magistrate Judge

Copies to:

Hon. Richard M. Berman  
United States District Judge

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